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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1440

JEREMIAH OPIE, also known as
JERRY OPIE,
PETITIONER,

v.

LEONARD F. MEACHAM, WARDEN OF THE
WYOMING STATE PENITENTIARY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

F. LEE BAILEY
One Center Plaza
Boston, Mass. 02108
GERALD ALCH
One Center Plaza
Boston, Mass. 02108

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Jeremiah Opie, also known as Jerry Opie, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 18, 1969.

Opinion Below

A copy of the opinion of the United States Court of Appeals for the Tenth Circuit in this case appears in the

Appendix hereto, together with the Opinions of the Supreme Court of Wyoming and the United States District Court for the District of Wyoming.

Jurisdiction

Petitioner was convicted of first degree murder and sentenced to life imprisonment on October 1, 1962, by the District Court in and for the County of Sweetwater, Wyoming. Upon appeal therefrom, the Supreme Court of Wyoming, on March 3, 1964, affirmed. On January 17, 1965, Petitioner filed a pro se Petition for a Writ of Habeas Corpus in the United States District Court for the District of Wyoming, which petition was dismissed without prejudice on April 26, 1965. Petitioner subsequently filed a Motion for New Trial in the State court which was denied by the trial court. The trial court's ruling was affirmed by the Supreme Court of Wyoming on January 9, 1967. On June 19, 1968, Petitioner again filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Wyoming, which was subsequently dismissed on December 4, 1968. Petitioner's petition for Re-Hearing was denied on March 28, 1969, after a complete evidentiary hearing. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit and the District Court's decision was affirmed on December 18, 1970.

Questions Presented

I. Was Petitioner's Representation by Trial Counsel So Lacking in Those Fundamental Precepts of Justice as to Amount to a Denial of Effective Assistance of Counsel and of Due Process of Law?

II. Has Petitioner Willfully and Deliberately Bypassed Available State Remedies?

III. Is Petitioner Innocent of the Crime For Which He Stands Convicted?

Statement of the Case

Petitioner was convicted of first degree murder and sentenced to life imprisonment by the District Court within and for the County of Sweetwater, State of Wyoming on October 1, 1962. Upon appeal therefrom, the Supreme Court of Wyoming, on March 3, 1964, affirmed. *Opie* v. *State*, 389 P. 2d 684. This opinion is reflected on page 24.

On January 14, 1965, Petitioner applied, pro se, for a Writ of Habeas Corpus in the United States District Court for the District of Wyoming the contents of which included an allegation of trial counsel incompetency. Specifically, Petitioner alleged that trial counsel had refused to obtain available expert opinion evidence to contradict the State's theory of first degree murder. On April 26, 1965 said Petition was dismissed without prejudice to the right of Petitioner to renew same after the matters contained therein were fully and finally litigated in State Courts.

Petitioner subsequently retained Attorney C. L. Bates of Rawlins, Wyoming for the purpose of raising in State Court the issues contained in his pro se Federal petition. Attorney Bates chose to utilize the procedural avenue of "newly discovered evidence" and filed a petition for new trial on this ground in the District Court of Sweetwater County which was denied. The Supreme Court of Wyoming on January 9, 1967, affirmed said denial on the ground that the alleged "newly discovered evidence" was merely cumulative and that Petitioner had failed to satisfy the requirement that said evidence had come to his knowledge since trial and that it was not owing to want of due diligence that it did not come sooner. Said opinion is set forth

as Appendix C to this petition. In effect, the Court held that said evidence could and should have been presented at time of trial.

On June 19, 1968 Petitioner instituted a Petition for Writ of Habeas Corpus in response to which the Respondent moved to dismiss on the ground that Petitioner had deliberately by-passed available State remedies. This responsive pleading was *exclusively* concerned with this procedural objection and in no way contested the merits of Petitioner's petition.

On September 27, 1968 a hearing was held before the Court below to determine the merits of the Respondent's motion to dismiss. As a result thereof that Court promulgated an order dated December 4, 1968 sustaining Respondent's motion to dismiss which order is reflected on page 43. Said order unequivocally found that Petitioner *had not* deliberately by-passed available State remedies, but went on to decide the merits of Petitioner's Petition against his favor although these issues had been neither orally argued nor formulated by the then existing pleadings. Accordingly, on December 14, 1968 Petitioner filed a Petition for Re-Hearing. Ordinarily, such a petition is a request for a second evaluation of matters previously presented and argued. Such was not the instant case since Petitioner had theretofore concerned himself, in argument before the Court below, solely with the procedural issue of "deliberate by-pass" and neither party had presented evidence pertaining to the merits of Petitioner's petition.

Petitioner's petition for Re-Hearing was argued on January 31, 1969. A complete evidentiary hearing was held. Said petition was denied on March 28, 1969 by order reflected on page 49. Petitioner's application for certificate of probable cause was granted on April 17 and notice of Appeal was filed on April 24, 1969.

Reasons for Granting the Writ

I

PETITIONER'S REPRESENTATION BY TRIAL COUNSEL WAS SO LACKING IN THOSE FUNDAMENTAL PRECEPTS OF JUSTICE AS TO AMOUNT TO A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AND OF DUE PROCESS OF LAW.

A. *Applicable Case Law*

It has been firmly established that to sustain a claim of incompetent counsel it is necessary to demonstrate that the representation was such as to make the trial a mockery, a sham or a farce. *Linebarger* v. *Oklahoma*, 404 F.2d 1092 (10th Cir. 1968); *Tafoya* v. *U. S.*, 386 F. 2d 537 (10th Cir. 1967); *Johnson* v. *U. S.*, 380 F. 2d 810 (10th Cir. 1967); *Goforth* v. *U. S.*, 314 F. 2d 868 (10th Cir. 1963), cert. den. 374 U.S. 812. The constitutional guarantee of effective assistance of counsel concerns itself with instances in which, resulting from the sub-standard level of services of the attorney, the trial becomes mockery and farcical so that the judgment is open to collateral attack. *Frand* v. *U. S.*, 301 F. 2d 102 (10th Cir.) What is required is a showing both that there has been gross incompetency of counsel and that this has in effect blotted out the essence of a substantial defense. *Bruce* v. *U. S.*, 379 F. 2d 113 (D.C. 1967). Counsel must have been so incompetent as to deprive the client of a trial in any real sense. *Odom* v. *U. S.*, 377 F. 2d 853 (5th Cir. 1967). The attorney's conduct complained of must be shocking to the conscience of the Court. *Scott* v. *U. S.*, 344 F. 2d 72 (6th Cir. 1964), cert. den. 379 U.S. 842, 84 S. Ct. 81.

B. *The Performance of Trial Counsel*

The State's theory of first degree murder was necessarily predicated upon the following allegations:

1. The murder weapon which caused the homicide was discharged at a distance from the deceased of not less than 18 inches.

2. The deceased did not have her hands on the gun at the time of discharge.

3. The death weapon was in a safe condition and possessed a "normal trigger pull."

Petitioner's testimony at trial was to the effect that the fatal wound was accidentally inflicted during the struggle with the deceased and was contact or near contact in nature.

THUS, THE ISSUE OF PETITIONER'S GUILT OR INNOCENCE WAS FORMULATED BY AND INDELIBLY INTERTWINED WITH THE STATE'S BURDEN OF PROVING THE ABOVE-STATED FACTS. IF PETITIONER HAD PRESENTED EVIDENCE TO RAISE A REASONABLE DOUBT AS TO THIS THEORY OF PROSECUTION, A VERDICT OF ACQUITTAL WOULD HAVE NECESSARILY RESULTED.

During the inquest held at the Coroner's Court for Sweetwater County, Wyoming, on March 26, 1962 George M. Nimmo, Sheriff of Sweetwater County was called to testify. The following questions and answers are reflected in the record thereof:

> Mr. Trenary: Would you care to estimate the distance from the victim's face that the gun would be to have left the powder stains that were discussed in this inquest.
>
> Mr. Nimmo: I am not in a position to state to the jury the distance which the gun was held to be fired. I can only say that the evidence of residual powder or

powder burns, that the gun was fired at close range. What distance, I couldn't say.

Mr. Wilmetti: In attempting to clarify that, could you give them any indication if the gun was held against the flesh or if there was any distance.

Mr. Nimmo: In an attempt to clarify it, it was not a muzzle flesh impact. The muzzle was away from the flesh — how many inches, I couldn't say. I don't know the shot pattern of a .44 Magnum. That could be looked up. We have books on it in the office. We could look it up in a ballistic manual and we could estimate it after we studied it, the ballistic pattern. As to my own knowledge, I don't know the shot pattern. The trajectory of the bullet, it entered the victim's right eye, approximately one inch below the eye and the trajectory passes up and in back of the head. Its trajectory goes up.

Thus, the only self-styled "expert" unequivocally testified that he was incapable of estimating the distance between the deceased and the fatal weapon at time of discharge.

During trial the following dialogue occurred, during cross examination, between Sheriff Nimmo and trial counsel: (Pages 130-131 of the trial transcript)

Q. Now, do you — or were you able to state with any certainty as to the distance that this gun would have been discharged?

A. With the absence of smoke residue, in my opinion, the gun was fired at a point greater than 18 inches.

Q. Is that what you testified at the Coroner's Inquest?

A. said — I don't know what I said but—

Q. Now, would you be incorrect if I told you that you

stated that the gun was fired at a very close range?

A. I just stated it was fired at a distance greater than 18 inches.

Q. Greater than 18?

A. Wasn't that my answer?

Q. No. Your answer was that it was very close.

Mr. Wilmetti: Where is that, Mr. Marty?

Q. You found actual evidence then, of powder burns on her face, in your opinion, is that right?

A. In my opinion, there was some powder tattooes.

Q. And your statement was, reading it to you: "I can only say that from the evidence of residual powder burns that the gun was fired at a close range." Now you say you found these powder burns on the right-hand side mostly, is that right?

A. Around the wound area, yes, sir.

Q. Did you also find them on the lefthand side?

A. There was some on the left bridge of the nose, yes, sir.

Trial counsel, for some unexplained reason, did not directly confront the witness with his equivocal and inconsistent prior statements under oath directly bearing on his testimonial qualifications.

Petitioner does not contend that the distance between weapon and flesh (was it a contact wound) is in all instances of homicide determinative of guilt or innocence. In the instant case, however, the death of Appellant's wife could have been caused in one of two ways:

A. By act of accident, as Appellant testified.
B. By act of murder as the prosecution sought to prove.

THE MAIN FACTOR IN ESTABLISHING WHICH CONTENTION WAS FACTUAL WAS WHETHER OR NOT THE FATAL WOUND WAS CONTACT OR NEAR CONTACT IN NATURE.

A supplementary factor was the condition of the fatal weapon with regard to its trigger pull.

At no time did trial counsel attempt to present evidence, expert or otherwise, relating to these crucial issues.

C. *Petitioner's Motion For New Trial*

On October 25, 1965 Appellant, having retained other counsel, filed a Motion for New Trial based on "newly discovered evidence." Evidence was introduced therein which showed that it was physically impossible for the fatal weapon to have been fired in the manner alleged by the prosecution.

Specifically, this evidence unequivocally established:

1. The gun was fired not closer than 1/2 inch nor further away than 1 1/2 inches. (The prosecution had alleged that the gun was fired not closer than 18 inches).
2. The gun had a trigger pull of approximately 2 1/2 lbs. and was an unsafe weapon with a very light trigger pull. (The prosecution had alleged that the gun was not unsafe and had a normal trigger pull).
3. That the Appellant was attempting to take the weapon from the deceased at the time it was fired, that he was not in a position to have voluntarily fired the weapon at the time the fatal wound was incurred; that the Appellant was in close proximity to the deceased at the time the fatal wound was incurred and that he could not have been a minimum of 26 inches away (18 inches plus the length of the gun at

8 inches) from the deceased at the time the gun was fired.

The Supreme Court of Wyoming in affirming the denial of said Motion for New Trial noted that all of these matters "could have been testified to" (at trial). "There is and can be no claim of newly discovered evidence in connection with any of such matters." Thus, that Court held by inference, that this evidence was not "newly discovered" in that it was owing to a want of due diligence that it was not presented at trial.

D. *Federal Court Proceedings*

As noted above, the initial order of the Court below sustained the Respondent's motion to dismiss. Although only procedural issues had been formulated by the theretofore filed pleadings, said Court, on December 4, 1968, adversely determined the merits of Petitioner's petition concluding that the standards warranting relief for incompetent counsel had not been met. Desiring to present to the Court all available evidence in support of his allegations Petitioner petitioned for a re-hearing which was held on January 31, 1969. The scientific and expert opinion evidence, originally reflected in Petitioner's Motion for New Trial was presented to the Court supported by testimony and seven affidavits which unequivocally established the *impossibility* of the State's theory of prosecution. *The Respondent produced no contradictory evidence* but rather requested leave of Court to subsequently file any affidavits which would tend to negate Petitioner's contentions. Only two such affidavits were in fact filed, both based exclusively upon an examination of photographs of the fatal wound. Petitioner's experts had testified that said photographs unequivocally showed the fatal wound to be contact in

nature. Respondent's expert affidavits merely stated that "it is not possible to determine with any degree of certainty whether or not powder particles are present along the inner border of the entry wound or the tears along the immediate edge." Thus, Respondent responded to Petitioner's positive expert evidence merely with equivocal and negative comments. This Honorable Court may be assured that if directly contradicting expert opinions were available same would have been presented.

Conclusion

This Court's attention is directed to the fact that during this re-hearing the Respondent raised the question of exhumation in an apparent attempt to refute the expert opinion evidence proffered by the Petitioner. It was insinuated that said exhumation, if accomplished, would in no way substantiate Petitioner's vital contention that the fatal wound was contact in nature. Subsequent to said hearing, Petitioner, relying on the truth wherever it was to be found, proposed to Respondent a stipulation for exhumation of the deceased at Petitioner's expense. Said stipulation is reflected on page 51.

It is interesting to note that the suggestion of exhumation originated with the Respondent; but in his stipulation, his position on this topic decisively shifts from offensive to defensive. His language is couched in terms such as "(he) has no objection" to Petitioner having the body of the deceased exhumed; he does not "hereby waive the argument that the distance of the gun from the deceased's head when fired is not relevant to the issue as to whether Petitioner was adequately represented by counsel at time of trial."

The Respondent, his challenge having been accepted, ignobly retreats therefrom.

The Court below, in overruling Petitioner's motion for exhumation (reflected on page 52) concluded that "the question of the distance of the gun from the deceased's head when fired, is irrelevant to the issue of who discharged the gun and is irrelevant to the issue of whether Petitioner was adequately represented by counsel at the time of trial." To which Petitioner responds:

1. The issue of distance is directly relevant to the issue of guilt or innocence.
2. Therefore, the issue of distance is directly relevant to the issue of adequate representation.

Let the truth emerge, from the ground if necessary.

It is respectfully submitted that whether or not Petitioner's expert evidence would probably have produced a different verdict (a criterion pertinent to "newly discovered evidence") is a legally inaccurate standard in dealing the issue of effective aid of counsel. This alleged defect is of constitutional dimension which, when claimed and shown, warrants a new trial unless the Appellate Court can state "beyond a reasonable doubt" that no prejudice has resulted. *Chapman* v. *California*, 386 U.S. 18. Appellant has presented *uncontradicted* expert opinion evidence completely refuting the prosecution's theory of guilt and *at least* establishing a reasonable doubt as to his innocence. IF SUCH EXACT, UNEQUIVOCAL AND COMPELLING EVIDENCE WAS AVAILABLE AT TIME OF TRIAL, WHY WAS IT NOT OBTAINED AND PRESENTED? There can be but one answer: Petitioner was denied the effective assistance of counsel.

II

PETITIONER HAS NOT WILFULLY AND DELIBERATELY BYPASSED AVAILABLE STATE REMEDIES.

The Respondent's initial response to the Petition for Writ of Habeas Corpus was a Motion to Dismiss based upon an alleged deliberate by-pass of available state remedies.

The landmark case of *Fay* v. *Noia,* 372 U.S. 391, 83 S. Ct. 822 teaches that there is "a limited discretion in the federal judge to deny relief" to a Habeas Corpus applicant for a procedural default; that one such circumstance is the deliberate by-passing of the orderly procedure of the state courts resulting in a forfeiture of state Court remedies; that the controlling standard is the intentional relinquishment or abandonment of a known right or privilege: as enunciated in *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S. Ct. 1019; that "the standard here put forth depends on the considered choice of the Petitioner"; that a "choice made by counsel not participated in by the Petitioner does not automatically bar relief"; and that the question of "waiver affecting federal rights is a federal question" with each case standing on its own facts.

Indeed, even a finding of deliberate by-passing of state remedies does not automatically preclude Habeas Corpus relief; it is discretionary. *U. S.* v. *McKendrick,* 266 F. Supp. 718 (1967). A federal District Court still has the power to grant Habeas Corpus. *Wilson* v. *Bailey,* 375 F. 2d 663 (1967). It is clear that the interest in achieving finality in criminal proceedings is to be valued less highly than the interest in assuring that no individual is deprived of life or liberty in violation of the Constitution. *The Supreme Court,* 1962 Term, 77 Harv. L. Rev. 140. The test for "deliberate by-pass" includes an awareness of availability of state remedy and a decision not to use it made by the Petitioner himself. *Watkins* v. *Crouse,* 344 F. 2d 927 (1965).

It should be noted that a claim of deliberate by-pass is applicable only to an applicant for Federal Habeas Corpus who has deliberately by-passed orderly procedure of State

Courts and in so doing *has forfeited his State Court remedies. Warden, Maryland Penitentiary* v. *Hayden,* 387 U.S. 294, 87 S. Ct. 1642 (1967). Respondent by the very language of his Motion for dismissal in effect alleged that there then existed no state remedies available to Petitioner. Respondent thus obviated the issue of the existence of available State remedies and substituted in lieu thereof the sole issue of whether Petitioner deliberately, understandingly and knowingly forewent the privilege of seeking to vindicate a Federal claim in the State Courts.

The Court below in its order of December 4, 1968 sustaining Respondent's Motion to Dismiss specifically found a complete lack of evidence that Appellant had deliberately by-passed State remedies (paragraph 14). Although in the preceding paragraph that Court noted that the Petitioner has alleged facts showing that the delay in not instituting proceedings under the State Post Conviction Act was not caused by his own neglect, it nevertheless *neither directed nor suggested that State application for relief was to be Petitioner's next procedural step.* Indeed, the fact that the Court reflected in its opinion its decision on the merits of Petitioner's petition emphatically warranted the conclusion that Petitioner had not deliberately by-passed State remedies and that the jurisdiction of a Federal District Court was proper. Surely, the issue of deliberate by-pass had been resolved in Petitioner's favor, i.e., the non-existence of available State remedies and the existence of Federal jurisdiction. Petitioner's subsequent Petition for Re-Hearing, filed on December 14, 1968, *was granted.* If the order of December 4, 1968 was to be interpreted as a denial of Federal jurisdiction on the ground of deliberate by-pass, surely said petition for re-hearing would have been denied upon this ground. Indeed, a full hearing was subsequently held on January 31, 1969 during which the

Court entertained any and all evidence Petitioner desired to present. Surely, this judicial attitude was equivalent to an affirmance of Federal jurisdiction.

In its order denying Petition for Re-Hearing, dated March 28, 1969, the Court below held that Petitioner's procedure *subsequent* to December 4, 1968 constituted a deliberate by-pass of State post conviction remedies. Surely, this position is inconsistent with that Court's granting Petitioner's Petition for Re-Hearing, the specific purpose of which was to present evidence on the merits of the issues. One cannot subsequently by-pass that which was never by-passed ab initio. Federal jurisdiction, having once attached, is permanent and remains in existence throughout appellate stages. Petitioner's Petition for Re-Hearing was not a new and separate action but rather a pleading relating back to the original Petition for Writ of Habeas Corpus. The procedural objection of deliberate by-pass, having once been laid to rest, should remain at rest. Indeed, the Court below in its order of March 28, 1969 again attempted to dispose of the merits of Petitioner's contentions which is inappropriate in the absence of jurisdiction.

Conclusion

As of December 4, 1968 Petitioner had not deliberately by-passed State remedies. It is respectfully submitted that a Petition for Re-Hearing, granted by the Court below, pertains solely to the merits of his original petition and should in no way be construed so as to resurrect the spectre of deliberate by-pass.

III

PETITIONER IS INNOCENT OF THE CRIME FOR WHICH HE STANDS CONVICTED.

There exists no authority for the raising of the issue of guilt or innocence in a Petition for Writ of Habeas Corpus. A petitioner must focus on some alleged constitutional violation, often technical in nature, and label the ground of his petition accordingly.

Bacon described the Writ of Habeas Corpus as a legal tool to prevent the commitment to jail of anyone "for a matter for which by law no man ought to be punished." It is submitted that the end purpose of the Great Writ is to protect innocent men against confinement. It is claimed that the purpose of the Writ is to insure that no human being, however loathesome the offense charged to him, would be imprisoned or punished without due process of law. This is conceded, but is not the basic reason behind such an insistence an effort to protect *innocent* people. The Writ of Habeas Corpus was designed to guard the liberties of the people. Should not the liberty of the innocent man be of at least equal concern with the desire to protect those rightly charged with crime.

There are statistics as to the almost negligible few who have been discharged through the benefit of Habeas Corpus. How many, if any, of those thus liberated were actually innocent men? There exist innumerable cases in which the command of the due process clause compels a Federal Court to reverse a State conviction involving the use of confessions obtained by impermissible methods, wherein independent corroborating evidence left little doubt of the truth of what the defendant had confessed.

Petitioner does not claim a coerced confession, a failure to advise as to constitutional rights, or an unreasonable search and seizure, all of which can warrant Habeas Corpus relief and none of which are necessarily inconsistent with the petitioner's guilt.

Petitioner claims that he is innocent. Because of a lack of precedent recognizing this ultimate of all issues as a ground for Habeas Corpus, Petitioner hangs his case before Federal tribunals upon the peg of "incompetent trial counsel." It is respectfully submitted that when a trial counsel, representing a defendant charged with a capital crime, fails to present *available and completely exonerating* evidence, this omission constitutes that degree of incompetency which reduces the trial proceedings to a sham, mockery and farce. We are not here dealing with a tactical or strategic error, but rather with a complete failure to adhere to the minimum standard of competency required of one defending a human being charged with a capital offense.

Trial counsel failed to confront an alleged State "expert" with his Coroner's Inquest testimony which completely nullified his qualifications so to testify. This was, under all of the circumstances, a sham, a mockery and a farce.

Trial counsel failed to present *available* scientific and expert opinion evidence which, under all of the circumstances, would have required a jury acquittal. This was a sham, a mockery and a farce.

An omission can constitute as grave an error as a commission.

The issue and the degree of inadequacy of counsel is acknowledged as a potential ground for Habeas Corpus relief. But what issue can be more crucial or vital than the ultimate question of guilt or innocence.

In the instant case the grounds for claiming inadequate representation are synonymous with those supporting the contention of innocence. Should there not exist some means of concentrating upon and adjudicating the merits of the latter.

Conclusion

Petitioner claims his innocence and his ability to establish same upon re-trial. He respectfully seeks appropriate relief.

Respectfully submitted,

F. Lee Bailey
One Center Plaza
Boston, Mass. 02108
Gerald Alch
One Center Plaza
Boston, Mass. 02108
Byron Hirst
400 Boyd Building
Cheyenne, Wyoming

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DECEMBER TERM — 1969

No. 335-69
JEREMIAH OPIE, also known as
JERRY OPIE,
PETITIONER-APPELLANT,
v.
LENARD F. MEACHAM, Warden of
the Wyoming State
Penitentiary,
RESPONDENT-APPELLEE.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF WYOMING
(No. 5253 Civil)

Before PICKETT, BREITENSTEIN and SETH, Circuit Judges
PICKETT, Circuit Judge

On October 1, 1962 Jeremiah Opie was convicted of first degree murder in the District Court of Sweetwater County, Wyoming and sentenced to life imprisonment. The conviction was affirmed. *Opie* v. *State, Wyo.*, 389 P.2d 684 (1964). This is an appeal from an order denying a petition for a writ of habeas corpus in which it was alleged that Opie's legal representation at the trial did not satisfy constitutional standards. The question of exhaustion of state remedies also arose in the district court proceedings.

The record discloses that on January 14, 1965 Opie filed

a Petition for Writ of Habeas Corpus in the United States District Court for the District of Wyoming which, at the request of Opie, was dismissed without prejudice to permit the presentation of the constitutional questions to the state courts. Thereafter, Opie, through counsel of his own choosing, elected to seek a new trial on the grounds of newly-discovered evidence, which was denied. On June 19, 1968 the present Petition for Writ of Habeas Corpus was filed in the United States District Court for the District of Wyoming, alleging that at the trial Opie had been denied effective assistance of counsel, which "representation was so lacking in those fundamental precepts of justice as to amount to a denial of due process." Specifically, the allegation was made that trial counsel did not present certain expert scientific opinion evidence dealing with the proximity of the murder weapon to the deceased when the fatal shot was fired, which would have contradicted the prosecution's evidence on the same subject matter, and if believed, would tend to establish the innocence of the accused.[1] Thereafter, the State of Wyoming moved to dismiss the Petition for Writ of Habeas Corpus, stating that state remedies provided for by Wyoming Statutes had been deliberately by-passed, Wyo. Stats. 1957, Title 7-408.1,[2] thereby barring relief in federal court. Following

---

[1] The newly-discovered evidence relied upon for a new trial was substantially the same as that now urged as a basis for determining that his trial representation was ineffective because of failure to produce and present such evidence at the trial. In affirming the denial of the Motion for New Trial, the Supreme Court of Wyoming related this evidence in detail in *Opie* v. *State*, Wyo., 422 P.2d 84 (1967).

[2] This section, in addition to creating a post conviction proceeding whereby any person imprisoned in the Wyoming State Penitentiary may attack the validity of his detention on constitutional grounds, provides: "No proceeding under this act shall be commenced more than five years after conviction and sentence of the accused, unless the petitioner alleges facts showing that the delay was not due to his own neglect."

a hearing on this motion, the trial court found that the available state remedies had not been deliberately bypassed. The court also found that the petitioner had been adequately represented at his trial by experienced counsel of his own choosing, and dismissed the action. On Petition for Rehearing, the court granted a full hearing at which all the evidence claimed to have been overlooked by Opie's trial counsel was presented and considered. Although the court held that as of the time of the hearing on the Petition for Rehearing the petitioner had deliberately failed to exhaust his state remedies, it decided the case on its merits, and we shall do likewise.[3]

The evidence relied on here in support of habeas corpus petitions came to light subsequent to trial through efforts other than those of trial counsel.[4] It was expert opinion evidence which would tend to contradict the testimony of other experts who gave their opinions on facts established at the trial. No new facts were offered. Clearly, this evidence could have been obtained by the exercise of due diligence. See *Opie* v. *State, Wyo.,* 422 P.2d 84. The effect of the failure to exercise due diligence in obtaining evidence on the issue of ineffective assistance of counsel was considered in *Cardarella* v. *United States,* 8 Cir., 375 F.2d 222 (1967), *cert. denied,* 389 U.S. 882, wherein that court, at page 232, stated:

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[3] From what was said by the Wyoming Supreme Court in *Opie* v. *State,* Wyo., 422 P.2d 84, we are convinced that any further proceeding in state court would be ineffective. See *Brown* v. *Allen,* 344 U.S. 443, 447 (1953); *Gay* v. *Graham,* 10 Cir., 269 F.2d 482, 485 (1959).

[4] The purpose of the evidence was to establish that due to the trajectory of the bullet, Opie's position at the time of the shooting and the location of blood stains on his clothing, the events could not have occurred as proposed by the State—or at least—had this evidence been before the jury at trial, it would have created a reasonable doubt.

> ". . . '(L)ack of diligence' in discovering evidence which was not used at the trial is not necessarily to be equated with ineffective assistance of counsel. Perfect or errorless counsel is not required as a prerequisite to a fair trial consonant with due process."

Indeed, it would appear that the failure to produce the expert scientific evidence at trial was either an oversight or a stratagem. Petitioner is now dissatisfied with the performance by his trial counsel, yet "one who appears before the court with counsel employed for his defense is not deprived of his constitutional right to the assistance of counsel merely because in retrospection he concludes that such representation did not meet his standards of effectiveness." *Moss* v. *Hunter*, 10 Cir., 167 F.2d 683, 684 (1948), *cert. denied*, 334 U.S. 860, *reh. denied*, 335 U.S. 839. See also *Merritt* v. *Hunter*, 10 Cir., 170 F.2d 739 (1948); *Johnson* v. *United States*, 10 Cir., 333 F.2d 371 (1964). Finally we note that "(i)n every case a lawyer loses, it is possible, in retrospect, to say that some different strategy or procedure might have brought about a better result. But this is not sufficient to sustain a claim of ineffective assistance of counsel. To sustain such a claim we would have to be able to conclude that the representation was such as to make the trial a mockery, a sham or a farce." *Johnson* v. *United States*, 10 Cir., 380 F.2d 810, 812 (1967). See also *Relford* v. *Commandant*, U.S. Disciplinary Barracks, 10 Cir., 409 F.2d 824 (1969). Counsel for Opie on this appeal readily concedes that the trial was not a "mockery, a sham or a farce" but asserts that the offered evidence would at least create a reasonable doubt in the minds of the jury. This is rank speculation, particularly in view of the state trial record which overwhelmingly points to the guilt of the accused. Furthermore, the guilt or innocence of an accused person when determined by a state court is not subject to review by federal

courts in habeas corpus proceedings. A state prisoner is entitled to relief in federal courts only when rights guaranteed by the United States Constitution have been denied him. *Wagenknecht* v. *Crouse,* 10 Cir., 344 F.2d 920 (1965).

AFFIRMED.

APPENDIX B

IN THE SUPREME COURT, STATE OF WYOMING
OCTOBER TERM, A.D., 1963

Mar. 3, 1964

No. 3167
CENSORED WYO. STATE PEN

JERAMIAH OPIE, also known
as JERRY OPIE,
APPELLANT
(*Defendant below*),
v.
THE STATE OF WYOMING
APPELLEE
(*Plaintiff below*).

Appeal from the District Court of Sweetwater County, Wyoming, The Honorable Glen G. Stanton, Judge.

For the appellant the cause was submitted upon the brief of Lawrence A. Marty, Green River, Wyoming; J. Reuel Armstrong and Kenneth W. Keldsen, Rawlins, Wyoming; and oral argument by Mr. Armstrong and Mr. Marty.

For the appellee the cause was submitted upon the brief of Dean W. Borthwick, Deputy Attorney General, Cheyenne, Wyoming; and oral argument by Mr. Borthwick and Joe R. Wilmetti, Former County and Prosecuting Attorney of Sweetwater County, Rock Springs, Wyoming.

Before PARKER, C.J. and HARNSBERGER, GRAY, and MCINTYRE, J.J.

Mr. Justice HARNSBERGER delivered the opinion of the court.

An information charged Jeramiah Opie, also known as Jerry Opie, did unlawfully, purposely, and with premeditated malice kill and murder his wife, Iris Opie. Defend-

ant, tried by a jury, was found guilty of murder in the first degree, without capital punishment, and the court sentenced Opie to life imprisonment. He now appeals, claiming reversible error for: (1) failure to direct a verdict of acquittal at the close of the State's case and after both he and the State rested, because the evidence did not show beyond a reasonable doubt that deceased came to her death by means inconsistent with defendant's uncontradicted testimony; (2) lack of competent evidence of premeditation and motive; (3) failure to dismiss charge of second degree murder as there was a lack of evidence of purpose, malice, or motive; (4) failure to dismiss charge of manslaughter as there was a lack of evidence of any quarrel or sudden heat of passion or criminal negligence or unlawful act; (5) receiving in evidence a gunbelt and holsters, a 44 calibre magnum hand-gun, and five gunpowder-pattern test sheets of blotting paper, without foundation being laid; (6) giving Instruction No. 8, because it stated, "absolute certainty in establishment of any fact is rarely attainable and never required in courts of justice"; (7) giving Instruction No. 30, as it inferred jury should compromise its verdict; (8) refusing Instruction A, which said evidence of defendant's threats toward one other than deceased should not be considered; (9) refusing Instruction B, which admonished jury to view with caution testimony as to oral admission or confession of defendant; (10) permitting sheriff's testimony as to how defendant's father obtained the 44 calibre hand-gun; (11) overruling defendant's objection to State's attempt to impeach and solicit testimony from a witness and placing answers in the witness' mouth; (12) permitting testimony of threats against witness; and (13) because information did not allege facts to prove involuntary manslaughter, unlawful act, culpable neglect, or criminal carelessness.

In considering appellant's first point, it should be borne

in mind that verdicts of acquittal are only directed when in the court's opinion there is no substantial evidence to sustain the material allegations of the information. It is not the province of the court to determine "beyond a reasonable doubt" any disputed fact.

At the close of the State's case, the evidence showed that sometime after 4 o'clock the morning of March 24, 1962, Iris Opie, defendant's wife, was found dead in the living room of an apartment occupied by the Opies, her lifeless body reclining in an over-stuffed armchair with her legs and feet resting upon a large hassock or ottoman in front of the chair; that she was shot with defendant's 44 calibre magnum hand-gun revolver or pistol, the bullet striking Iris somewhat below her right eye, going at first straight back through her head, and found in her matted hair at a point where her head rested against the top portion of the chair's back. The pistol was found to contain a spent cartridge under the hammer, then there was an empty chamber, and then a live round, counterclockwise.

The deceased's face showed no powder smoke or smudging which would be present if the muzzle of the gun had been within 18 inches of her face when the fatal shot was fired, but deceased's face did have upon it small particles of unburned powder which indicated the muzzle of the weapon was within a distance of approximately 3 1 2 feet from the victim's face when it was fired. After the body of deceased was found, defendant came into the room and started toward her, when an officer grabbed defendant by the arm and told defendant to sit down and take it easy. The defendant then said, "Where I'm going I won't have to relax," and when an officer was taking defendant from jail, defendant said, "You fellows said all along that sometime I would kill someone. Now you have me on the big one." When defendant was not permitted

to stop at the mortuary where his wife's body was, defendant said, "Don't a condemned man have any rights at all," and asked how soon after trial the execution would be, and said "It's already cut and dried." When an officer approached defendant to arrest him, defendant said, "I have been waiting for you. I won't run away from you. I really fouled up this time. I shot her, I loved her and I should go to the gas chamber." About 1 to 2 o'clock in the morning, before the shooting, defendant asked a witness if he ever felt like killing anyone—how the witness felt when he and his wife were splitting up and if the witness was mad enough to kill his wife, and defendant said that he would like to try his gun on something—that he was going to kill someone that night, and defendant asked if the witness had ever caught the witness' wife "shacking" with another man, and asked if witness felt like killing the witness' wife when he caught her (shacking up with another man), and that he, the defendant, was going to kill someone before the night was over. To this evidence there was added testimony that defendant had become extremely angry at an acquaintance of deceased, went to his home and said, "Come on, let's go." "I'm going to kick your head in"; that on March 23, 1962, this acquaintance of deceased had delivered some cards to the apartment building in which the Opies lived, and later defendant told the acquaintance someone had informed defendant the acquaintance had been "down there." Finally, the eight-year-old son of the deceased testified that the night his mother died he had awakened and heard his mother crying, heard defendant say, "Shall I pull the trigger now?" and heard his mother say, "Go ahead"; that he heard the "lever" go back and then he went to sleep. There is absent from the record any testimony or evidence to show how much time elapsed from when the boy heard this conversation and heard the lever go back,

until the shot was fired, but his testimony was that he went to sleep and did not hear the shot which may have indicated to the jury that the shot was fired some time later. Photographs showing the deceased in the position she was found, the wound upon her face, the place where the spent bullet was found, the burnt-powder peppering marks upon her face, test sheets showing effect of shots fired from defendant's gun, and the gun itself were also in evidence.

This brief resume of the evidence most favorable to the State's case was ample, substantial, and sufficient when accompanied by fair and just inferences, reasonably drawn, to be submitted to the jury and to deny appellant's motion made at the close of the State's case for a directed verdict of acquittal.

Additional evidence supplied upon presentation of defendant's case showed that about 5 o'clock the morning of March 24, 1962, defendant was at the home of his parents with the magnum pistol in his hand; that defendant put the gun down, his father picked it up, put the gun on the floor of the father's car, and later turned it over to the sheriff, and defendant said something about Iris being hurt. The father then went to defendant's apartment, found the door open, entered, and saw Iris reclining in the chair as though asleep. He felt her hand, phoned the sheriff, left the apartment, and locked the door. Later the father returned to defendant's apartment with his wife, found police officers and a doctor there; the officers took pictures, and the father gave the sheriff the gun. Defendant's father testified, "Nobody touched anything until officers arrived."

While the jury was not required to accept defendant's testimony as to what happened, in order to portray the conflicts shown by the State's evidence with defendant's version of what had occurred, the defendant's story will

be briefly stated. According to defendant, the night of the shooting he had a large number of drinks and after 4 a.m., went home. When he entered his apartment he found his wife sitting in the chair with the ottoman in front of it, and she said, "Jerry," "If you don't quit your running around," and again, "'If I didn't quit my running around and drinking'" that she was going to shoot herself; that she "came up with this gun of mine" with her hands on the grip and started to raise the gun up to her forehead; that defendant grabbed the gun with his right hand around the chamber, then grabbed the gun with his left hand "like this"; then deceased grabbed the gun on the end of the barrel with her left hand and started to pull the gun down; they struggled; he "started to lose grip a little bit," and the gun went off; defendant didn't have the gun in his hands "Because I bent over," and "I put my hands on her face like this and the blood started to roll down"; that defendant barely had a grip on the gun and "the only thing I know is that I had ahold of the gun"; then he went to his parents' home; defendant did not know if his wife was wounded or hurt or dead; he did not call a doctor; he did not move his wife after the gun went off; and she was in the same position "As when I first walked into the house."

Under the evidence, when the fatal shot was fired the muzzle of the gun must have been at least, if not more than, 18 inches from the face of deceased or its firing would have left smoke-smudging on her face, and the peppering or tattooing from unburned powder particles found on her face would have been more concentrated and more evenly distributed than they were, and the burned particles of powder would have adhered more tightly to the skin. As there was no such smoke-smudging or concentration and even distribution of particules of burned powder adhering tightly to the skin of deceased's face, the obvious conclusion

available to the jury was that at the time of firing the lethal weapon its muzzle was at least 18 inches or more away from the face of the deceased.

As previously stated, the peppering or tattooing from unburned powder would not be present when the muzzle of the used weapon was more than 3½ feet from the target. The jury was therefore also entitled to believe that the shot which took deceased's life was fired when the muzzle of the gun was at a distance of more than 18 inches but less than 3½ feet from the face of the deceased. Other testimony showed it took an average amount of pressure on the trigger to discharge the weapon and that the trigger pull was not unsafe. Taken altogether, with reasonable inferences, the evidence was substantial and sufficient to warrant the jury's concluding the pistol was not fired by the deceased. Photographic evidence of the victim showing her reclining in the armchair with her legs and feet extended and resting on the ottoman in front of the chair was ample to show the jury she was not a large person or that the length of her arms gave her an unusual or abnormal reach. The gun which has quite a long barrel was before the jury. From all the evidence submitted to it the jury was therefore entitled to conclude, as it evidently did, that it would have been physically impossible for the deceased to have held the gun in the manner described by the defendant, so aimed that the bullet went "straight back" and at the same time have the muzzle of the weapon 18 or more inches distant from her face when it was fired. There was nothing in this defense evidence to require a directed verdict of acquittal and the denial of the second motion was correct.

Appellant's point (2) is not well taken. While motive is frequently an aid in the solution of a criminal act, it is not a positive requirement that motive be proved. However, in this case, the circumstances developed by evidence did

show a motive as well as premeditation. Defendant had been told that a former acquaintance of the deceased was seen shortly prior to the killing at the apartment building where the Opies resided; that defendant had previously shown his hostility toward that acquaintance; that his statements to others, made just before the deceased was shot, indicated he was thinking about wives being unfaithful; that he was asking if another man whose wife had been unfaithful became mad enough to kill his wife when the wife was caught being unfaithful; that defendant then said he was going to kill someone before the night was over; and his overheard query to his own wife, "shall I pull the trigger now?" were compelling evidences that, whether it was true or not, he felt his wife was unfaithful, that he was mad, and that he had in mind the purpose to kill, followed closely by the fatal shooting of his wife. All this gave reasonable and fair inference that defendant had formed the purpose to kill and murder his own wife and that the act was premeditated and consummated with legal malice. This adversely disposes of appellant's point (2).

It also rules against appellant's point (3).

Point (4) is so lacking in merit that it is overruled without comment.

As little significance seems to have attached to the gun-belt and holsters, their admission in evidence even if without sufficient foundation would not amount to reversible error, but the nature of the crime and their presence at the scene of crime, was sufficient foundation when so determined by the trial judge whose discretion in such a case should not be too narrowly limited. It is enough to say that as the 44 calibre magnum gun was stipulated to be the defendant's, and its identification as being the weapon from which the death-dealing shot was fired, provided ample foundation for its admission in evidence. The five gunpower-pattern test sheets of blotting paper which were identified,

explained and testified about in the testimony of a witness who was accepted without defense objection as a qualified ballistic expert and who was the person who made the tests exhibited by the sheets, were thereby adequately authenticated as worthy of acceptance in evidence to illustrate the testimony given by the witness, and therefore a sufficient foundation was provided for their admission in evidence. Thus appellant's point (5) is unavailing to him. *Thrawley* v. *State*, 153 Ind. 375, 55 N.E. 95, 99; 4 Chamberlayne, *Modern Law of Evidence*, § 3171, p. 4391 (1913).

Appellant agrees that Instruction No. 8 is a correct statement of the law including its saying "absolute certainty in the establishment of any fact is rarely attainable and never required in courts of justice." See *Cornish* v. *Territory*, 3 Wyo. 95, 97, 3 P. 793, 795; *Gardner* v. *State*, 27 Wyo. 316, 323, 196 P. 750, 751, 15 A.L.R. 1040. But appellant says the instruction is erroneous because the inference is given that there is doubt of defendant's innocence, especially as there were 33 instructions given, a majority of which dealt with guilt. Upon a careful reading of all of the instructions and considering them as a whole, as the jury was directed to do, no such inference is found. Point (6) is overruled.

Instruction No. 30 tells the jury that each juror should give careful consideration to the views of the other jurors respecting the testimony in the case, not to shut his ears and stand stubbornly upon the position he first takes regardless of what may be said by other jurors, and instructed that it should be the object of all to arrive at a common conclusion. Appellant says this suggests a compromise or majority verdict.

If jurors were not expected to consult together, exchange views and try to reach a conclusion common to all, there would be no purpose in having them retire together and discuss the evidence. It would be enough for them to

separately and secretly cast their respective ballots and the verdict would abide the result. There is a vast difference in listening with an open mind to the views of fellow jurors before reaching a conclusive opinion and to compromise, for the latter means a juror would forego a fixed conviction merely to reach agreement. Point (7) is rejected.

Instruction A, offered by appellant, was properly refused. Although the court refused this instruction because it felt the record failed to show there was any threat to a person other than the deceased, there is a further reason for which the instruction was properly refused. There was testimony that indicated defendant resented a male acquaintance of the deceased and told that acquaintance defendant was going to "kick his head in." If this is taken to be a threat to a person other than the deceased, it was not only admissible in evidence under the circumstances, but it should have been considered as bearing upon defendant's state of mind and his feelings not only against the acquaintance but also his feelings regarding his own wife, the deceased. A threat against a third person is admissible when circumstances are shown which indicate some relation or connection between the homicide and the third party threatened. There was substantial evidence that justified a conclusion that defendant was jealous of what he thought were the attentions paid his wife by the person defendant threatened and that he at least suspected impropriety in their relations. The admissibility of these threats come within the rule discussed in 40 C.J.S. Homicide § 206(c), p. 1111; 26 Am.Jur., Homicide, § 359, p. 404, and in *State* v. *Spears*, 76 Wyo. 82, 106, 300 P.2d 551, 560, 561, and were entitled to be considered by the jury. Appellant's point (8) is overruled.

The trial court refused Instruction B because it was felt the matter of credibility of witnesses was adequately covered by other instructions given. We agree. The refused instruction read:

> "The Court instructs the jury that the law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission or confession of the defendant or an oral confession by him."

This singled out testimonies regarding admissions or statements made by defendant and told the jury to give special attention to the credibility of those witnesses who testified to such admissions or statements. Point (9) is therefore overruled.

Appellant's point (10) is that the sheriff was permitted to give hearsay testimony as to where and from whom defendant's father received the gun. The record does not show any objection was made to any specific question asked or answer given by the sheriff which violated the hearsay-evidence rule. The only objection made in this connection followed the incomplete question, "And then did he take it from—" At this point defense counsel said, "Just a minute, I object. This is hearsay as to what he said relative to this matter, and ask what he has testified be stricken out." If the previous examination of the sheriff relative to the matter is considered as subject to this defense request for striking, it should be said the purport of that examination was to explain why no investigation was made as to possible fingerprints upon the gun, the witness testifying that this was because the gun was not at the scene; had apparently been removed; and that witness knew defendant's father had handled the gun because the father had told him. It appears from the record that upon previous cross examination of the witness, the defense opened the subject by inquiring how the witness knew the fingerprints would have no value. Under these circumstances the State was allowed to let the witness explain how that knowledge was gained. Appellant's point (10) shows no error.

Appellant next complains that the State attempted to impeach one of its own witnesses; and of suggesting answers to the witness by reading to him his previous statements recorded on tape but not signed or verified by him. The record shows that after the witness was permitted to read what was referred to as his former statement, he was asked if that refreshed his memory as to the exact wording and if it was correct. Upon his relying that it was correct, the witness explained that his testimony about "shacking" meant catching his wife with another man. This refreshing of the witness' recollection has no semblance of impeachment and is a far cry from suggesting his answers. No merit is found in appelalnt's point (11).

A complete answer to appellant's point (12) is given under what is said with reference to point (8).

Point (13) is completely without merit.

Finding no error in the record, the verdict of conviction without capital punishment and the judgment and sentence pronounced thereon are affirmed.

Affirmed.

IN THE SUPREME COURT, STATE OF WYOMING
OCTOBER TERM, A.D. 1966

No. 3516 Jan 9 1967

JEREMIAH OPIE, also known as
JERRY OPIE,
APPELLANT
(*Petitioner below*),
v.
STATE OF WYOMING,
APPELLEE
(*Respondent below*).

Appeal from the District Court of Sweetwater County, Wyoming, the Honorable C. Stuart Brown, Judge

For appellant the cause was submitted upon the brief and oral argument of C. L. Bates, Rawlins, Wyoming.

For appellee the cause was submitted upon the brief and oral argument of Dean W. Borthwick, Deputy Attorney General for the State of Wyoming, Cheyenne, Wyoming.

Before PARKER, C. J. and HARNSBERGER, GRAY, *and* MCINTYRE, JJ.

Mr. JUSTICE MCINTYRE delivered the opinion of the court.

Jeremiah Opie was convicted in the District Court of Sweetwater County of first degree murder for the killing of his wife. The jury fixed the penalty at life imprisonment. This court affirmed the judgment and sentence which resulted from the jury's verdict in *Opie* v. *State*, Wyo., 389 P.2d 684.

More than a year after affirmance defendant filed a petition in the District Court of Sweetwater County for a new trial, alleging newly discovered evidence which could not with reasonable diligence have been discovered and produced at his trial. The matter was heard by District Judge C. Stuart Brown, who denied the motion. Defendant-petitioner has appealed.

Counsel for petitioner seems to recognize that it is within the sound discretion of the trial court to grant or refuse a motion for new trial based on the discovery of new evidence; and that the action of such court cannot be challenged except for an abuse of discretion. See *People* v. *Jefferson*, 47 Cal.2d 438, 303 P.2d 1024, 1029, *certiorari denied*, 352 U.S. 1029, 77 S.Ct. 597, 1 L.Ed.2d 600; and *State* v. *Boulton*, 66 Wyo. 222, 208 P.2d 291, 296. Our question, then, is not whether the district court would have been justified in granting a new trial, but whether it was erroneous for it not to grant a new trial.

Also, appellant's counsel makes it clear he is cognizant

of the general rule that it is incumbent on a party who asks for a new trial on the grounds of newly discovered evidence to satisfy the court: (1) That the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it is so material that it would probably produce a different verdict, if the new trial were granted; and (4) that it is not cumulative, viz., speaking to facts in relation to which there was evidence at the trial. *United States* v. *Johnson*, 7 Cir., 142 F.2d 588, 592, *certiorari dismissed* 323 U.S. 806, 65 S.Ct. 264, 89 L.Ed. 643[1] See also *People* v. *Beard*, 46 Cal.2d 278, 294 P.2d 29, 31.

It is significant to note that petitioner's attorney claims to have made an extensive investigation of facts upon which the motion for new trial is predicated. He recites the purpose of the investigation was to review the transcript of the coroner's inquest and the transcript of the actual trial with the intent to "evaluate" same. One of the prinpal findings claimed from this investigation was that the physical evidence introduced at the trial was not "properly evaluated" at the trial.

Such approach in defendant's effort for a new trial suggests the motion is not based on newly discovered evidence in the sense of something observed, as distinguished from inferences and opinions formed as a result of what witnesses observed. It is stated in 32 C.J.S. Evidence, § 546(1), p. 111, where a person testifies to what he observes, hears, or smells, it is a statement of fact and not a conclusion.

Petitioner purports to have newly discovered opinion evidence but not newly discovered fact evidence. Hence,

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[1] Certiorari was dismissed in this case to permit a second motion for new trial based on the discovery of more new evidence; the second motion was denied by the district court; the denial was reversed by the circuit court, 149 F.2d 31; the action of the circuit court was reversed and the cause remanded to the district court to enforce the judgment denying new trial, 327 U.S. 106, 66 S.Ct. 464, 90 L.Ed. 562.

we are presented with the question as to whether a convicted felon can take the old facts as testified to at his trial by witnesses who saw, heard, or smelled and obtain a new trial by showing that he can now produce expert opinions contradicting expert opinions testified to at his trial, with respect to those inferences and conclusions which can reasonably be drawn from the facts testified to.

Appellant fails to cite authority for the affirmative of this proposition. On the other hand, there is respectable authority for the rule that a new trial will not be granted for newly discovered evidence, when the alleged newly discovered evidence is merely cumulative or when it is merely impeaching or contradictory of the former evidence. *State* v. *Gordon*, 208 Or. 455, 302 P.2d 214, 218; *State* v. *Luttrell*, 28 N.M. 393, 212 P. 739, 741; *Phillips* v. *State*, Okla. Crim., 267 P.2d 167, 174; *State* v. *Wilson*, 38 Wash.2d 593, 231 P.2d 288, 303, *certiorari denied* 342 U.S. 855, 72 S.Ct. 81, 96 L.Ed. 644, *certiorari denied* 343 U.S. 950, 72 S.Ct. 1044, 96 L.Ed. 1352.

We are inclined to believe, if appellant's theory were sanctioned, it would open the doors to endless requests for new trials in all kinds of cases. Nevertheless, we will not at this time say it is impossible to have circumstances where a court might see fit to grant a new trial because of newly discovered expert opinions on previously known facts. Instead, we will rest our decision on the proposition that the trial court in this instance was amply justified in refusing defendant's request, and its ruling was not erroneous for abuse of discretion.

On the basis of evidence adduced at the hearing on defendant's petition for new trial, counsel for defendant contends he has new evidence which:

1. Will dispute expert testimony offered at the trial, to the effect that the gun which killed defendant's wife was fired from a distance of 18 inches to three and

one-half feet, and show instead that this distance was from one-half inch to one and one-half inches; and

2. Will dispute expert testimony offered at the trial, that the gun was not unsafe and had a normal trigger pull, and show instead that the gun was an unsafe weapon with a trigger pull of approximately two and one-half pounds.

Gun's Distance From Victim

At his trial, the defendant claimed his wife had possession of defendant's gun and was about to commit suicide; that he attempted to take the gun from her; and that it was discharged as they struggled over it, while deceased still had hold of it. Testimony and pictures offered at the trial tended to show the wound was clean with no evidence of powder burns around the edges and no evidence of deep powder burns. Experts at the trial claimed such would have been present if the muzzle of the gun had been within 18 inches of decedent's face. There was testimony that the face did have black peppery marks of unburned powder on it—apparently over an extensive area—which indicated, according to ballistic experts testifying at the trial. the muzzle was within a distance of approximately three and one-half feet.

It is contended on behalf of appellant that since his trial and appeal, ballistic experts have been found who will testify and demonstrate from experiments that, based on the pictures and testimony introduced at defendant's trial, it is their opinion the muzzle of the gun could not have been less than one-half inch or more than one and one-half inches from decedent's face when the weapon was discharged.

We set forth in our former opinion, at 389 P.2d 686, that witnesses testified to the condition of Mrs. Opie's face, saying there was an absence of powder burns or smoke which would be expected to be present if the muzzle had

been within real close proximity to the face (like less than 18 inches). However, as above noted there was testimony that her face did have small particules of unburned powder on it.

Defendant's present attorney did not participate in the original trial of Opie. He may be construing the original evidence differently than it was originally understood, but there was evidence before the jury from which it was entitled to determine that the muzzle of the gun was away from the face more like a distance of 18 inches to three and one-half feet than like a distance of one-half inch to one and one-half inches.

This brings us to the conclusion that the trial judge was justified in denying the motion for new trial on the ground of newly discovered evidence pertaining to the distance of the gun from decedent's face. An application for new trial must be denied when it does not appear the alleged newly discovered evidence would probably produce a different verdict. *State* v. *Spears*, 76 Wyo. 82, 300 P.2d 551, 565; *Pasco* v. *State*, 19 Wyo. 344, 117 P.862, 863, See also *Tobler* v. *State*, 87 Okla. Crim. 25, 194 P.2d 202, 205; *State* v. *Davis*, 192 Or. 575, 235 P.2d 761, 762-763; and *State* v. *Collett*, 118 Mont. 473, 167 P.2d 584, 588.

Trigger Pull

Opie testified at his trial that he had filed the trigger release on his gun so that it had a sort of "hair trigger," in other words a tendency to be discharged with a very light trigger pull. An F.B.I. agent, however, testified the gun was not an unsafe weapon and had a normal trigger pull. In connection with his motion for new trial, Opie alleges newly discovered evidence in the form of new opinion evidence by gun experts who would testify the gun is an unsafe weapon with a light trigger pull of only two and one-half pounds.

Here again, the alleged newly discovered evidence is

evidence which contradicts evidence produced at the trial. It speaks to a matter in relation to which there was evidence at the trial, and for this reason the judge who heard petitioner's motion would have been justified in denying the motion. *United States* v. *Johnson*, 7 Cir., 142 F.2d 588, 592, *certiorari dismissed* 323 U.S. 806, 65 S.Ct. 264, 89 L.Ed. 643.

Aside from that reason, however, the judge may have considered that the gun itself was in evidence at Opie's trial. Members of the jury must have had an opportunity to examine the gun and see for themselves whether the trigger pull was relatively normal or unusually light. The members of our court made such an examination when Opie's conviction was before us on appeal, and we were unable to say the pull was not relatively normal.

In *Pan American Petroleum Corporation* v. *Like*, Wyo., 381 P.2d 70, 73, we said expert testimony is not necessary where the matter involved is within the common knowledge and experience of the jurors. Although the opinions of experts may have been helpful to the jury in deciding, if it needed to so decide, whether the gun had a lighter than usual trigger pull, that was not the ultimate issue to be decided in this instance. The question was not whether the gun could have been accidentally discharged, but whether it actually was accidentally discharged. On that issue the defendant had a complete and full hearing. Anything he might add now would be purely cumulative or contradictory and hence not such newly discovered evidence as would warrant a new trial.

Under these circumstances, the judge who heard petitioner's motion was entitled to believe the alleged newly discovered evidence relative to trigger pull would not be likely to produce a different verdict. He was therefore, justified in denying this ground for a new trial.

Other Claims

In addition to the two principal contentions of appellant

which we have discussed, his attorney mentions several other matters, apparently suggesting there was insufficient evidence for the verdict of the jury and our affirmance thereof. For example, he argues the decedent could have had possession of the gun and there could have been a struggle for it, because Opie's middle finger, palm and thumb of the right hand were burned from the gun; that splattered blood spots on Opie's clothing prove he was in close proximity to the deceased at the time the fatal wound was incurred; and that the path which the bullet followed through decedent's head would indicate the gun was discharged from the position claimed by defendant and not the position claimed by the prosecution.

Concerning the trajectory of the bullet, witnesses at the trial indicated decedent may have been reclining in an over-stuffed chair and not sitting upright. Also, medical testimony indicated the bullet seemed to go straight in and then was deflected upward. This would make appellant's present hypothesis erroneous. In any event, this claim and other claims referred to in the preceding paragraph are based primarily on defendant's own testimony rather than the testimony of prosecution witnesses. Such claims overlook the fact that this is not a second appeal of defendant's conviction.

Whatever the facts may have been regarding a burned hand, blood splattered clothing, and the trajectory of the bullet, they were fully known at the time of trial. All of these matters were either testified to by defendant at his trial, or they could have been testified to. There is and can be no claim of newly discovered evidence in connection with any of such matters.

It should perhaps be noted that this court has elected to dispose of the instant case on the merits rather than on the question of whether defendant is entitled to be heard at all. By doing so, we do not mean to imply a decision

one way or the other on the right of defendant to be heard in an instance where there has been a delay in filing a motion for new trial.

Since it does not appear that the district judge abused his discretion in denying defendant's motion for a new trial, his ruling is approved.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. 5253 Civil.

JEREMIAH OPIE, also known as
JERRY OPIE,
PETITIONER,
v.
LEONARD F. MEACHAM, Warden of the
Wyoming State Penitentiary,
RESPONDENT.

ORDER SUSTAINING MOTION TO DISMISS

The above entitled matter having come on regularly for hearing before the Court upon the motion of Leonard F. Meacham, Warden of the Wyoming State Penitentiary, to dismiss the petition of Jeremiah Opie, also known as Jerry Opie, for writ of habeas corpus, petitioner appearing in person and by and with his personally retained counsel, Byron Hirst and James L. Applegate of the firm of Hirst, Applegate & Thomas, and byF. Lee Bailey, and respondent, Leonard F. Meacham, Warden of the Wyoming State Penitentiary, being represented by James E. Barrett, Attorney General of the State of Wyoming, Lynn R. Garrett, Deputy Attorney General of the State of Wyoming, and Jack Speight, Assistant Attorney General of the State of Wyoming, and the Court having heard evidence adduced by and

on behalf of petitioner, and evidence adduced on behalf of respondent, and having heard arguments of counsel in support of the motion to dismiss and in opposition thereto, took said matter under advisement; and having considered the record on file herein and the evidence adduced at the hearing on the motion to dismiss, and having examined the briefs of counsel filed on behalf of petitioner and on behalf of respondent, and having studied the authorities relied upon by the parties, and being fully advised in the premises, the Court FINDS:

1. Petitioner is presently detained in the Wyoming State Penitentiary at Rawlins, Wyoming, pursuant to the sentence imposed October 1, 1962, by the District Court, Second Judicial District, County of Sweetwater, State of Wyoming.

2. Petitioner was tried by a jury for the offense of murder in the first degree to which he had entered his plea of not guilty. He was sentenced to life imprisonment after the jury returned its verdict finding petitioner guilty of murder in the first degree.

3. At said trial, petitioner was represented by counsel of his own choosing, Lawrence A. Marty of Green River, Wyoming, and by J. Reuel Armstrong and Kenneth W. Keldsen of Rawlins, Wyoming.

4. Petitioner, represented by the same three attorneys who defended him at the trial, appealed to the Supreme Court of the State of Wyoming. He claimed reversible error on thirteen issues. On March 3, 1964, the Supreme Court found no error in the record and affirmed the verdict of conviction without capital punishment and the judgment and sentence pronounced thereon. *Opie* v. *The State of Wyoming*, Wyo. 1964, 389 P.2d 684.

5. On January 14, 1965, without benefit of counsel, petitioner filed his petition for a Writ of Habeas Corpus in the United States District Court for the District of Wyo-

ming, claiming, inter alia, that he had been deprived of his constitutional right to competent counsel. He alleged that his trial counsel had refused to obtain expert opinion evidence to contradict the prosecution's ballistic expert. On April 20, 1965, petitioner requested this court to dismiss his petition acknowledging that he had to exhaust his state remedies. On April 26, 1965, the United States District Court for the District of Wyoming dismissed petitioner's petition for Writ of Habeas Corpus without prejudice to the right to renew the petition after the matter was fully and finally litigated in the state court. D.C. Wyoming No. 4874 Civil.

6. Immediately thereafter, petitioner retained another attorney in Rawlins, Wyoming, C. L. Bates, and requested him to raise in appropriate state courts the issues which petitioner raised in his January 14, 1965, petition for writ of habeas corpus.

7. On December 20, 1965, C. L. Bates, Esq., filed a motion for a new trial in the District Court, Second Judicial District, Sweetwater County, Wyoming, on the ground of newly discovered evidence to the effect that expert witnesses would dispute the expert testimony offered by the prosecution at the trial that the gun which killed defendant's wife was fired from a distance of 18 inches to three and one-half feet, and that petitioner's expert witnesses would show instead that this distance was from one-half inch to one and one-half inches. Said motion for a new trial was denied by the trial court, and Mr. Bates appealed to the Supreme Court of the State of Wyoming.

8. On January 9, 1967, the Supreme Court of Wyoming passed on petitioner's contention that expert opinion evidence could and should have been, but was not, presented at trial. Concluding that the trial judge was justified in denying petitioner's motion for a new trial on the ground of newly discovered evidence pertaining to the distance

of the gun from decedent's face, the Wyoming Supreme Court stated that "An application for new trial must be denied when it does not appear the alleged newly discovered evidence would probably produce a different verdict". *Opie v. State of Wyoming*, Wyo. 1967, 422 P.2d 84, 87.

9. Petitioner has no grounds, therefore, to substantiate his claim that the expert testimony he desires would have been "of such evidentiary weight so as to warrant, if not compel, a jury to find facts fully consistent with the petitioner's testimony, resulting in a verdict of not guilty".

10. October 1, 1967, was the last day within the five year period of limitation for proceeding under the post-conviction act of the State of Wyoming. Laws 1961, Ch. 63, Sec. 1; Section 7-408.1 W.S. 1957 as amended.

11. On June 19, 1968, represented by F. Lee Bailey, who was personally selected and retained by petitioner, the petition for Writ of Habeas Corpus was filed in this court by petitioner alleging that the conviction and sentence under which he is being detained were imposed in violation of the Sixth and Fourteenth Amendments to the United States Constitution "in that petitioner was denied effective assistance of counsel whose representation was so lacking in those fundamental precepts of justice as to amount to a denial of due process".

12. The statutory five year limitation of the Wyoming Post Conviction Remedy statute is flexible and gives petitioner relief where he "alleges facts showing that the delay was not due to his own neglect". Laws 1961, Ch. 63, Sec. 1; Sec. 7-408.1 W.S. 1957 as amended.

13. Petitioner has alleged facts showing that the delay in not instituting proceedings under the post conviction act was not caused by his own neglect; petitioner alleges that prior to October 1, 1967, he requested his counsel to raise the issue of inadequate representation by counsel in the appropriate state court; it was admitted by petitioner's

present attorney that the failure to file a petition for post conviction relief was due to his, not the petitioner's, neglect.

14. There is no evidence that petitioner deliberately by-passed the available state remedies.

15. This Court takes judicial notice that counsel employed by petitioner were able and experienced lawyers. J. Reuel Armstrong, a former Solicitor, Department of the Interior, and presently State District Judge in the State of Wyoming, has had almost forty years experience before the bar of this court and the state courts. Mr. C. L. Bates has had more than thirty-five years experience before the bar of this court and the state courts, and he has specialized in criminal defense matters. Mr. Marty is an able and experienced lawyer with more than ten years experience. Mr. Keldsen, associated with J. Reuel Armstrong for a number of years, has had almost twenty years experience before the bar of this court and of the state courts.

16. The strategy employed by counsel failed to bring about the verdict hoped for by petitioner, but success in litigation is not the test of competent representation. *Mize* v. *Crouse*, 10 Cir., 399 F.2d 593 (1968); *Johnson* v. *United States*, 10 Cir., 380 F.2d 810 (1967). Petitioner was not entitled to a perfect trial, but one that was fair and impartial. Petitioner's case presents no facet of irregular procedure or substance inconsistent with justice. A study of the decisions of the Wyoming Supreme Court in petitioner's appeals, persuades this Court that defense counsel were confronted with a difficult defense.

17. Petitioner has made no charge that his counsel were not ordinarily competent or that they lacked good faith in their trial or procedural tactics. There are no allegations showing that petitioner's counsel were so incompetent that they made a farce of his trial such as to require the court to intervene in behalf of the accused, the petitioner herein. There is no substance in petitioner's contention that any

of his counsel were inefficient in their representation of petitioner.

18. The state is responsible under the due process requirement contained in the Fourteenth Amendment to protect an accused's right to have the effective assistance of competent counsel. Where, as here, however, petitioner retained counsel of his own choice to represent him, he cannot successfully claim that the state denied him the right to have effective assistance of counsel. It is only the denial of that right that would have put petitioner in the position to challenge a judgment of conviction by writ of habeas corpus. *Hudspeth, Warden* v. *McDonald*, 10 Cir., 120 F.2d 962, 968 (1941), *Cert. Den.* 314 U.S. 617.

19. The effectiveness of his personally selected and retained counsel is petitioner's sole responsibility. The commission by petitioner's counsel of acts that "may retrospectively appear to be errors of judgment in the conduct of the defense does not constitute a denial of due process chargeable to the state". *Piascik* v. *Heinze*, D. Cal., 178 F. Supp. 364, 366 (1959); *Merritt* v. *Hunter*, 10 Cir., 170 F.2d 739 (1948).

20. It is not proper, in a habeas corpus proceeding "to attack the validity of the judgment in a criminal case, merely on the ground that the defendant was inadequately represented by his own deliberately selected counsel". *Morton* v. *Welch*, 4 Cir., 162 F.2d 840, 842 (1947), *Cert. Den.* 332 U.S. 779, 334 U.S. 848.

21. Neither the petition for writ of habeas corpus nor the evidence adduced at the hearing in this court merits the issue of a writ of habeas corpus.

Now, Therefore, It Is Ordered that respondent's motion to dismiss be, and the same is hereby, sustained.

Dated this 4th day of December, 1968.

Ewing T. Kerr, *Judge*.

ORDER DENYING PETITION FOR REHEARING

The above entitled matter having come on regularly before the Court upon petition filed by Jeremiah Opie, also known as Jerry Opie, for a rehearing of his petition for Writ of Habeas Corpus, said petitioner appearing in person and by and through his counsel Richard V. Thomas and Gerald Aleh, and respondent, Leonard F. Meacham, appearing by and through James E. Barrett, Attorney General of the State of Wyoming, and by Lynn R. Garrett, Deputy Attorney General of the State of Wyoming, and the Court having heard the testimony of the witness called on behalf of petitioner, and the stipulation made by counsel in open court, and having heard arguments of counsel in support of and in opposition to said motion, took said matter under advisement; and having examined the record on file herein, and the exhibits offered and received at the hearing on the petition for rehearing, and having examined the affidavits and counter affidavits filed herein, and being fully advised in the premises, the Court FINDS:

1. By order filed on December 4, 1968, sustaining the respondent's motion to dismiss, this Court found, inter alia, that at all times material herein, petitioner had been represented by his personally selected and personally retained counsel; that the effectiveness of petitioner's personally selected and retained counsel is his sole responsibility; that petitioner has no grounds to claim that the state denied him the right to have adequate assistance of counsel; and that the alleged inadequacy of petitioner's personally selected and retained counsel is not a proper ground on which to issue a writ of habeas corpus.

2. In said order of December 4, 1968, sustaining respondent's motion to dismiss, this Court found that October 1, 1967, was the last day within the five year period

ORDER DENYING PETITION FOR REHEARING

The above entitled matter having come on regularly before the Court upon petition filed by Jeremiah Opie, also known as Jerry Opie, for a rehearing of his petition for Writ of Habeas Corpus, said petitioner appearing in person and by and through his counsel Richard V. Thomas and Gerald Aleh, and respondent, Leonard F. Meacham, appearing by and through James E. Barrett, Attorney General of the State of Wyoming, and by Lynn R. Garrett, Deputy Attorney General of the State of Wyoming, and the Court having heard the testimony of the witness called on behalf of petitioner, and the stipulation made by counsel in open court, and having heard arguments of counsel in support of and in opposition to said motion, took said matter under advisement; and having examined the record on file herein, and the exhibits offered and received at the hearing on the petition for rehearing, and having examined the affidavits and counter affidavits filed herein, and being fully advised in the premises, the Court Finds:

1. By order filed on December 4, 1968, sustaining the respondent's motion to dismiss, this Court found, inter alia, that at all times material herein, petitioner had been represented by his personally selected and personally retained counsel; that the effectiveness of petitioner's personally selected and retained counsel is his sole responsibility; that petitioner has no grounds to claim that the state denied him the right to have adequate assistance of counsel; and that the alleged inadequacy of petitioner's personally selected and retained counsel is not a proper ground on which to issue a writ of habeas corpus.

2. In said order of December 4, 1968, sustaining respondent's motion to dismiss, this Court found that October 1, 1967, was the last day within the five year period

of limitation for proceeding under the post-conviction act of the State of Wyoming; that petitioner alleged facts showing the delay in not instituting proceedings under said post-conviction act was not caused by his own neglect; and that there was no evidence that petitioner deliberately by-passed the available state remedies.

3. Since the aforesaid order of this Court filed herein on December 4, 1968, petitioner and his personally selected and retained counsel have not commenced proceedings under the post-conviction act of the State of Wyoming; petitioner has not alleged facts showing that such delay subsequent to December 4, 1968, was not due to his own neglect; and the record clearly shows that petitioner has failed to exhaust his available state remedy, and that he has wilfully and deliberately by-passed the state's post-conviction remedies available to him.

4. Petitioner is not entitled to by-pass available state remedies for habeas corpus relief in the federal court. *Terry* v. *Patterson*, 372 F.2d 480, 10 Cir. 1967.

5. The evidence proposed to be available to petitioner to support the theory of his defense concerning the position of the gun which killed petitioner's wife does not appear to be of such evidentiary weight so as to warrant a jury to find facts fully consistent with petitioner's testimony and to return a verdict of not guilty.

6. The affidavits introduced by petitioner and those introduced by respondent show, at best, conflicting opinions of the expert pathologists. On the whole, they constitute merely speculative evidence; they disregard other testimony and admissions introduced at the trial of this matter with all of which petitioner's trial lawyer had to be concerned.

7. The alleged expert and scientific evidence proffered by petitioner does not support petitioner's claim that it

would not have been subject to multiple interpretation, but rather would have compelled and dictated a verdict of acquittal.

8. The alleged failure of petitioner's trial counsel to present the evidence which petitioner now claims would have resulted in a verdict of acquittal, did not reduce petitioner's trial to a mockery, sham, or farce.

9. A review of the available scientific and expert opinion evidence neither warrants, nor compels, a conclusion that petitioner was denied effective assistance of counsel.

Now, Therefore, It Is Ordered that the petition of Jeremiah Opie, also known as Jerry Opie, for rehearing of his petition for Writ of Habeas Corpus which was dismissed by this Court by order made and entered on December 4, 1968, be, and the same is hereby, denied.

Dated this 28 day of March, 1969.

Ewing T. Kerr, *Judge.*

STIPULATION

Comes now the respondent herein and respectfully stipulates and agrees as follows:

1. That respondent has no objection to petitioner having the body of Iris Opie exhumed at petitioner's expense.

2. That each party be afforded the right to have up to three chosen experts in attendance in the event the body is exhumed and to file by affidavit the opinions of said experts based upon the results thereof.

3. That a final determination by this court of the merits of the instant petition be deferred pending its receipt of said affidavits if the body is exhumed.

4. Respondent does not hereby waive the argument that the distance of the gun from the deceased's head when fired is not relevant to the issue as to whether petitioner was

adequately represented by counsel at the time of
argument was previously presented to this court.

(s) LYNN R. GARRETT

LYNN R. GARRETT,
Deputy Attorney Gene
Attorney for Res
Cheyenne, Wyoming 8
210 Capitol Building

ORDER OVERRULING MOTION FOR EXHUMATION

The above-entitled matter having come on re
fore the Court upon Petitioner's Motion for C
For Exhumation of the body of Iris Opie, and
having considered said motion of petitioner tog
Respondent's Stipulation to said motion, and h
the affidavits submitted by Petitioner and by R
and having examined the record on file herein,
fully advised in the premises,

FINDS that the question of the distance of the
the deceased's head when fired, is irrelevant t
of who discharged the gun, and is irrelevant t
of whether petitioner was adequately represented
at the time of the trial.

NOW, THEREFORE, IT IS ORDERED that Petitione
for the exhumation of the body of Iris Opie
same is, hereby overruled.

Dated this 28th day of March, 1969.

EWING, T. KERR, *J*

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